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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 346

VULCAN FURNITURE MANUFACTURING CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Vulcan Furniture Manufacturing Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 7, 1954.

OPINIONS BELOW

The decision and direction of election by the National Labor Relations Board dated August 29, 1951, is printed in the Transcript of Record, pp. 28-31, filed herewith. The decision and order of the Board dated March 20, 1953, is

printed in the Transcript of Record pp. 81-84. The opinion of the Court of Appeals (R. 102-111)[1] is not yet reported and is printed in Appendix B hereto, *infra*, p. 17.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1954 (R. 112; Appendix B hereto, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer, in proceedings before the National Labor Relations Board, has the right to submit evidence to the Board of the non-compliance of a labor organization with the filing requirements of Section 9(h) of the Act.

2. Whether blank ballots cast in a representation election must be considered in determining the total number of votes cast.[2]

STATUTES INVOLVED

The statutory provisions involved are the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151 et seq.), printed in Appendix A, *infra*, p. 13; and the Subversive Activities Control Act of 1950, as amended by the Communist Control Act of 1954 (Act of September 23, 1950, c. 1024, 81st Cong., 64 Stat. 987, 50 U.S.C., Chap. 23, Subchapter I, Sec. 781-798, as amended by Act of August 24, 1954, Public Law ....., 83d Cong., 2d Sess.) printed in Appendix A, *infra*, p. 13.

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[1] In this Petition "R." designates a reference to the Transcript of Record; "BA." a reference to the Appendix to the Board's Brief; and "RA." a reference to the Appendix to this Petitioner's brief below.

[2] This question is subordinate in importance to question 1, *supra*, however the Petitioner respectfully requests the right to present argument on this question in the event that writ of certiorari is granted.

STATEMENT OF THE CASE

The United Furniture Workers of America, CIO, filed a petition with the National Labor Relations Board on May 27, 1951, requesting to be certified as representative of the employees of Vulcan Furniture Manufacturing Corporation (R. 4-10). A hearing on the petition was held before a Board agent designated by the Regional Director, Tenth Region, on July 16, 1951 (R. 17-19, BA. 27-79). Petitioner (Respondent below) made a motion that the petition be dismissed or held in abeyance pending further investigation of the Union which was believed by the Petitioner to be Communist "inclined and aligned" (BA. 40). The Hearing Officer would not pass on the motion but referred it to the Board for ruling (BA. 44-45), and the Board, on August 29, 1951, denied the motion to dismiss the petition and directed that a representation election be held among the employees in the unit designated by it (R. 28-31), stating that the "fact of compliance by a labor organization which is required to comply, is a matter for administrative determination and is not litigable by the parties. Moreover, the Board is administratively satisfied that the Petitioner is in compliance" (R. 29 n. 1).

Election by secret ballot was duly announced and was held on September 25, 1951 (R. 34-35). There were 24 eligible voters all of whom cast their ballots. There were 12 votes for the Union, 9 against and 3 ballots were blank (R. 32-33). The Union was declared the winner of the election on the theory that only 21 valid votes were cast (R. 42). The Petitioner filed objections to the election, contending, in part, that the blank ballots should have been considered as valid votes cast in determining whether the Union had a majority of the votes cast, rather than have been treated as utterly void and of no effect for any purpose (R. 42).

The Regional Director conducted an investigation of the objections (R. 41), and in his report recommended that they be dismissed and that the Union be certified (R. 45). The Petitioner filed objections to the report (R. 46-50). The Board overruled the objections, and on January 21, 1952, certified the Union as the appropriate bargaining representative (R. 50-53). Thereafter the Union filed charges against Petitioner alleging refusal to bargain collectively with it (R. 54-57, 58-61). As a result thereof, the Regional Director was caused to issue a complaint alleging that such refusal to bargain constituted an unfair labor practice under Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act (R. 63-66). Petitioner filed its answer to said complaint, alleging *inter alia* that the Union was not in compliance with Section 9(h) of the Act (R. 68-73).

A hearing was held on the complaint and answer before a Trial Examiner on July 28, 1952 (BA. 1-26). Petitioner attempted, through cross examination of the Union's representative, to show who were all of the officers of the Union (BA. 16-17), and attempted to introduce evidence which would tend to show that there were officers of the Union who were Communists (BA. 16-25). The attempts were frustrated and the introduction of all such evidence was rejected by the Trial Examiner (BA. 16, 24-25).

The Trial Examiner issued his Intermediate Report finding that the Petitioner had committed the unfair labor practices alleged (R. 86-95), and the case was transferred to the Board (R. 74). The Board adopted the findings of the Trial Examiner (R. 81-82), and ruled that the rejection of evidence of Communist domination of the Union was proper, again taking the position that the fact of compliance is a matter for administrative determination, and is not litigable. The Board further stated that it "has administratively determined that the Union has complied with the

requirements of Section 9(b)[(h)] by reason of the fact that its officers have filed non-Communist affidavits" (R. 82 n. 2). Further, the Board held that it had no authority to investigate the question, citing *American Communications Association v. Herzog, et al.*, 110 F. Supp. 220 (D.C. D.C.). Accordingly, the Board Ordered Petitioner, on March 20, 1953, to stop refusing to bargain collectively with the Union (R. 83-84).

Thereafter, the Board filed a Petition for Enforcement of its Order in the U. S. Court of Appeals for the Fifth Circuit (R. 1-4). The Court of Appeals, by its Opinion and Judgment dated July 7, 1954, decreed that the Board's order of March 20, 1953, be enforced (R. 102-112).

REASONS FOR GRANTING THE WRIT

1. There is no provision in the National Labor Relations Act specifying how compliance by a labor organization with Section 9(h) of the Act is to be determined. The decisions of the United States Court of Appeals for the District of Columbia Circuit, and for the Fifth and Sixth Circuits, and the vacillations of the Board have not only failed to answer that problem, but have made it impossible for the Board, under any circumstances, to determine compliance in any case where there might actually be some question whether there has been compliance. Furthermore, there appears to be a direct conflict in legal principle existing in the decisions of these courts.

Earlier in the administration of the Act, the Board adopted the attitude that it should not inquire into the truthfulness of the affidavits. *Craddock-Terry Shoe Corp.*, 76 NLRB 842. Then, in December, 1952, the Board, prompted by a grand jury presentment for perjury in an affidavit filed with this Board, ordered the Electrical, Radio and Machine Workers of America and other unions to file an-

swers to certain questionnaires in regard to the Communist status of their officers, and declared that failure to file would render a union out of compliance with Section 9(h) of the Act. The unions filed a motion for injunction in the District Court for the District of Columbia, which motion was granted. *United Electrical, Radio and Machine Workers of America (UE) et al. v. Herzog, et al.*, 110 F. Supp. 220 (D.C. D.C.). These cases were appealed to the Court of Appeals for the District of Columbia Circuit where the District Court's action was affirmed. *Farmer, et al. v. United Electrical, Radio and Machine Workers of America (UE), et al.; Farmer, et al. v. American Communications Ass'n.;* and *Farmer, et al. v. International Fur & Leather Workers Union, etc.*, 211 F. 2d 36 (C.A.D.C.). The Court of Appeals held that the Board had no authority to inquire as to the truth or falsity of the affidavits. The Board was therefore rebuked in its attempt to investigate of its own initiative the question of compliance. A writ of certiorari was denied by this Court in the *Farmer* cases. 74 S. Ct. 638.

In *Aerovox Corporation v. National Labor Relations Board*, 211 F. 2d 640 (C.A.D.C.), there was an effort by the employer to introduce evidence before the Board of Communist domination in the union, and evidence that the Section 9(h) affidavits were untrue. The Board in that case denied the employer the right to introduce such evidence. The United States Court of Appeals for the District of Columbia Circuit, on the basis of *Farmer* cases, supra, affirmed the Board's action. In its opinion it made no attempt to distinguish between the situation where the Board of its own initiative decided to conduct an investigation and the situation where the employer attempted to supply the Board with information in regard to the truth of the affidavits.

The Solicitor General, in his memorandum on behalf of the Board filed in reply to the *Aerovox* petition to this Court for writ of certiorari, agreed with *Aerovox* that the Board had, and should have, the power to make a further investigation of the compliance question for the reasons urged in the Board's petition for writ of certiorari in the *Farmer* cases, and, like the Court of Appeals, made no distinction between the Board's position in the *Farmer* cases and the *Aerovox* case with respect to its power to investigate of its own motion or to receive evidence from a party to proceedings before it. Writ of certiorari was denied by this Court. 74 S. Ct. 779.

National Labor Relations Board v. Sharples Chemicals, 209 F. 2d 645 (C.A. 6), was an unfair labor practice case where the Board refused to make the question of compliance an issue at the hearing despite the demand of the employer. The Court of Appeals for the Sixth Circuit upheld the action of the Board but refused to do so on the theory of the *Farmer* cases, preferring to assume that the Board itself had the right to investigate compliance, but ruling that the employer could not litigate the Board's finding in an unfair labor practice proceeding under Section 10(b) of the Act.

The Court below in the instant case, which was an unfair labor practice proceeding before the Board arising out of a representation proceeding, agreed in its opinion with the holding of the Sixth Circuit in the *Sharples Chemicals* case, and also questioned the correctness of the opinion of the Court of Appeals in the *Farmer* cases, holding that the Board had the right and obligation to determine whether what purports to be an affidavit is one in fact and whether it truly discloses the non-Communist status of the union officers.

The Board, in its brief before the lower Court in the instant case, has now adopted the position of the Court of Appeals in the *Sharples Chemicals* case, stating that even though it does not agree with the *Farmer* cases, it does not believe that the verity of the affidavits can be litigated before the Board at the instance of private parties in ordinary unfair labor practice and representation cases.

The United States Court of Appeals for the Seventh Circuit adopted the view of the Sixth Circuit to the extent that the latter Circuit has held that an employer could not litigate the question of compliance in an unfair labor practices proceeding before the Board. *American Rubber Products Corp. v. National Labor Relations Board,* 22 L.W. 2637 (C.A. 7).

The decisions of the Court of Appeals in the *Farmer* cases and *Aerovox* case are believed to be erroneous. The decisions of the court below in this case and of the Court of Appeals for the Sixth Circuit in the *Sharples Chemicals* case are also believed to be erroneous to the extent that they may be construed to have denied a party's right to give (as opposed to litigate) and the Board's duty to receive, evidence of non-compliance with Section 9(h). So far as these two courts differ with the opinions of the Court of Appeals for the District of Columbia in regard to the Board's power to investigate the question of compliance with Section 9(h), and would hold that the Board has such power, they are believed to be correct.

2. An administrative agency is endowed with implied powers to protect its processes from abuse. *National Labor Relations Board v. Indiana & Michigan Electric Co.,* 318 U.S. 9, 18-19; *National Labor Relations Board v. Donnelly Garment Co.,* 330 U.S. 219, 235; See also, *National Labor Relations Board v. Weissman Co.,* 170 F. 2d 952, 954-955

(C.A. 6), certiorari denied, 336 U.S. 972. To deprive the Board of the right to inquire into the bona fides of these affidavits would destroy this power to protect the integrity of its own procedures.

Mr. Justice Jackson, in *Communications Assn. v. Douds*, 339 U.S. 382, 425, described the Communist movement as "a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and to overturn our system of free, representative self-government". Section 9(h) of the Act was designed by Congress to "'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party * * *'." *National Labor Relations Board v. Highland Park Manufacturing Co.*, 341 U.S. 322, 325. If the Board has no power to investigate false affidavits or to receive evidence about them, it cannot possibly insure compliance with Section 9(h). Then the whole purpose of that Section is frustrated and a potent weapon against Communism is thus rendered useless. Congress never intended the Board to be nothing but a filing cabinet for the affidavits. (See remarks of Senator Humphrey in *Congressional Record*, May 14, 1954, p. 6241.)

Assuming that the Board has the power to investigate the compliance status of the union, the Court below is in error in affirming the Board's refusal to permit Petitioner to present evidence to the Board to assist it in such investigation.

Petitioner was attempting to furnish the Board with information which would tend to show the falsity of the affidavits filed by the Union (BA. 21-25). It does not follow that Petitioner, because it offered to present this data to the Board while involved in a proceeding before the Board,

was litigating the question of compliance. To present evidence on a matter is not necessarily to litigate it. Petitioner's attitude, or status or motives are immaterial. The Board is charged with the administration of Section 9(h). It is not performing its function when it refuses to receive facts or refuses to recognize the facts for what they are.

In the great majority of instances, a representation or unfair labor practice proceeding before the Board will be the only opportunity of the Board to receive evidence bearing upon an alleged falsity of the affidavits. Employees and other persons of their own volition, are not likely to gather and submit such evidence to the Board unless they have a direct interest in the subject matter. They have such interest only when involved in a proceeding before the Board. Therefore, the practical effect of the opinions of the Court of Appeals for the District of Columbia Circuit and for the Fifth and Sixth Circuits is much the same. They all leave the Board virtually helpless to inquire into the truthfulness of the affidavits, even though the Fifth and Sixth Circuits would hold that it has the requisite power, because to deny the right and duty of the Board to receive evidence bearing upon compliance is to shut off its most likely and practical course for getting any information on which to base an investigation.

"The Board, in determining the question of compliance, should receive from any party having a legitimate interest in the proceeding information which might assist it in its administrative determination." *National Labor Relations Board v. Louisville Container Corp.*, 209 F. 2d 654, 656 (C.A. 6). Hence, the Sixth Circuit agreed with Petitioner that the Board should receive evidence of the falsity of non-Communist affidavits, but by its holdings refuses to allow an employer to present such evidence to the Board in its ordinary proceedings. But, in the course of the proceedings

the employer has his only opportunity to subpoena and question witnesses and examine documents from which eivdence relevant to compliance can be obtained and submitted to the Board. If the employer has not the right to do this he is in practically all cases reduced to the position of voicing privately to the Board what he would regard as suspicious. The effect of the policy of denial of such right is that the Board almost never receives the vital evidence.

When evidence pertaining to the non-compliance status of the union was attempted to be introduced before the Board in this case it had the duty to receive it. It cannot close its eyes when gross abuses of its affidavit processes are being brought to its attention; it has the duty to protect its processes. The present Board procedure for determining the question of compliance is nothing more than a clerical system and merely a perfunctory administrative procedure for handling the filing of forms. *National Labor Relations Board v. Greensboro Coca Cola Co.*, 180 F. 2d 840, 844, note 1 (C.A. 4).

3. The Subversive Activities Control Act of 1950, as amended by the Communist Control Act of 1954 is pertinent to any consideration of the question herein presented (Appendix A, *infra*, p. 13). It is respectfully submitted that this Act, as amended, does not obviate the need for consideration by this Court of this case which arose and was decided before the Act became law. The question herein presented is of paramount and permanent importance in the administration of the National Labor Relations Act, and therefore affects the entire population of this country. The Subversive Activities Control Act of 1950, as amended, may be the answer of Congress to the dilemma in which the Board was placed by the decisions in the *Farmer, Aerovox,* and the *Sharples Chemicals* cases, as well as this case, which

had the effect of leaving a vacuum so far as the investigation of and the enforcement of compliance with Section 9(h) were concerned. But that Act operates prospectively only. It is respectfully submitted that this Court should take this opportunity to express its opinion with regard to the Board's powers and duties in the administration of Section 9(h) of the National Labor Relations Act, in spite of this very recent amendment to the Subversive Activities Control Act of 1950.

CONCLUSION

For the aforegoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The relevant portion of the National Labor Relations Act, as amended, (29 U.S.C.A. 159(h)) is as follows:

"Section 9(h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 297, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits."

Relevant portions of the Subversive Activities Control Act of 1950, as amended by the Communist Control Act of 1954 (Act of September 23, 1950, c. 1024, 81st Cong., 64 Stat. 987, 50 U.S.C., Chapter 23, subchapter I, 781-798, as amended by Act of August 24, 1954, Public Law—, 83d Cong., 2d Sess.), are as follows:

"Sec. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

* * * * * *

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended, (29 U.S.C. 152) or to represent any employer in any matter or proceeding arising or pending under that Act.)

* * * * * *

Sec. 12. (a) There is established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party.

* * * * * *

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a 'Communist-action organization' within the meaning of paragraph (3) of section (3) of this title, or a 'Communist-front organization' within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.

* * * * * *

Sec. 13A.

(a) Whenever the Attorney General has reason to believe that any organization is a Communist-infil-

trated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

* * * * * *

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state its findings as to the facts and its conclusions with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950) the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U.S.C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U.S.C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U.S.C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a)(3)(ii) of such Act."

* * * * * *

APPENDIX B

The Opinion of the Court of Appeals is as follows:

Before BORAH and RUSSELL, Circuit Judges, and DAWKINS, District Judge.

RUSSELL, Circuit Judge: The National Labor Relations Board seeks enforcement of its order finding the respondent Vulcan Furniture Manufacturing Corporation, guilty of an unfair labor practice by its refusal to bargain with the United Furniture Workers of America, C.I.O., herein called the union, as the duly elected and certified representative of respondent's employees. There is no real question that there was a refusal to bargain. Such refusal and the present proceedings were the only means available to secure review here of respondent's contentions that the Board improperly certified the union as bargaining representative. *National Labor Relations Board v. Huntsville Manufacturing Co.*, 203 F. 2d 430; *Timken-Detroit Axle Co. v. National Labor Relations Board*, 6 Cir., 197 F. 2d 512.

Following the filing, on May 7th, 1951, by the union of a petition for certification as the bargaining representative of the respondent's employees, a hearing was held before a Board agent designated by the Regional Director. At the hearing the respondent moved that the petition be dismissed or held in abeyance pending further investigation as to the Communist affiliation of certain officers of the union. The hearing officer referred this motion to the Board and the Board overruled the motion and directed that an election be held, which was done by September 25th, 1951. Following the election the talley of ballots showed 24 eligible voters, 12 votes cast for the union, 9 against it and 3 "void" ballots. These latter were blank ballots which were cast by eligible voters. Respondent filed objections to the talley and, allegedly at the request of the Regional Director, also submitted an affidavit by one George Watson, an employee, for the purpose of showing that at least two of the blank ballots were the result of intimidation and coercion

by the union. These objections were recommended to be dismissed in a report by the Regional Director, which stated that an investigation had been made by an agent of the Board on the issue of coercion and, while referring to the Watson affidavit and other matters, stated that nothing discovered constituted evidence supporting the allegation that the union had engaged in any activity tending to restrain or coerce employees. This report concluded that the objections raised no "material or substantial issue with respect to the result of the election" and recommended that the Board certify the union on the basis of the majority of valid votes cast for it in the election.

Respondent insists that the Board erred in ruling that the union was in compliance with the provisions of section 9(h) of the Act[1] and in refusing to receive proffered evidence in support of respondent's contention that it was not in compliance. Respondent does not contend that the jurisdiction of the Board depended upon an affirmative showing that the union was in compliance. It contends, however, that upon its assertion that the union was not in actual compliance, the Board was required either to suspend the representation proceeding until an investigation of the charge should be made by the Board or to permit respondent to establish its allegations of non-compliance by proof. There is no contention that the nominal officers of the union have not filed the required non-Communist affidavits,

[1] Section 9(h) of the National Labor Relations Act, as amended, 29 U.S.C.A. 159(h): "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 297, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits."

but respondent urges that an investigation would disclose, or, given an opportunity to do so, it would prove that such affidavits are false or that some of the officers of the union, though not named as such or known to the Board as such, are members of the Communist Party, or are affiliated with it, and have not been required to file affidavits. In rejecting these contentions the Board held that the fact of compliance by a labor organization is a matter of administrative determination and is not litigable by the parties.

As was recently observed by the Court of Appeals for the Sixth Circuit, *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 650, there is no provision in the Act as to how or by whom the question of compliance is to be determined. In *Farmer v. United Electrical, Radio and Machine Workers*, 211 F. 2d 36, the Court of Appeals for the District of Columbia held that the Board is without authority to inquire into the truth or falsity of the affidavits and affirmed a judgment of the district court enjoining an effort to make such an investigation. In the *Sharples Chemicals* case the court expressed some doubt as to the correctness of this decision, but held that in any event a respondent in an unfair labor practice proceeding is not permitted to raise and litigate in that proceeding the question of compliance on the part of the charging union.

We likewise doubt the correctness of a ruling which forbids the Board to determine whether the affidavit requirements of the Act, a *sine qua non* for the exercise of the Board's powers,[2] have truly been complied with, that is, a ruling which forbids it to ascertain and determine whether what in form is an affidavit is merely a paper evidencing false swearing. It would seem that the Congress, having committed to the Board the broad powers of administration of the Act, and yet restricted the exercise of them in those instances only where the required affidavits have been filed, must necessarily have intended that the Board should be obligated to determine whether what purports to be an affi-

[2] *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U.S. 322; *National Labor Relations Board v. Postex Cotton Mills*, 181 F. 2d 919.

davit is one in fact and whether it truly discloses the non-Communist status of the union officers, but this exact question is not before us, and regardless of what views we might entertain on it, the courts of the District of Columbia, the sole venue of prohibitory suits against the Board, have ruled otherwise. In this venue situation the denial of certiorari by the Supreme Court in the *Farmer* case (22 L.W. 3254) may be entitled to more weight than is usually accorded such judgments. But the question before us presents a different situation and it is not answered by the statement that the Board may not initiate an inquiry into such matters even though it might appear clear that some method of testing the validity of such affidavits should be present. If no means for this exists it is a quesion for the Congress and not for the courts. Upon the point before us, assuming the fact that formal compliance with the statute exists, that is, that the required affidavits are filed with the Board, we find no proper basis in the Act for implication that a party in a proceeding before the Board may question the truthfulness of the affidavits or whether the ostensible officers filing them are the true directors of the union involved. As we have indicated, if such power of ascertainment exists anywere, it is with the Board. We are clear that Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act. We find no authority in the statute supporting the view that the truthfulness or completeness of the affidavits may be challenged in a defense to proceedings conducted by the Board,[3] though of course a different situation prevails where there has been no ostensible compliance.

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[3] If the employer were permitted to litigate the truth or falsity of the non-Communist affidavits required by section 9(h) on a case-to-case basis, by the same token he would be permitted to litigate in the same manner the truth or falsity of the financial statements and other documents required to be filed by sections 9(f) and 9(g) or require proof in each case that every member of the petitioning union has been furnished with a copy of the financial statement.

This is true even though in the present judicial climate of *Farmer, supra,* the Board may not be able to administratively determine such questions. That doubt may exist as to the power of the Board in such instances would not justify our attempting to approve a substitute procedure which is not within the intent of the statute. The objection of the respondent was properly overruled.

Respondent urges that the Board erred in considering the three blank ballots void and in failing to count them as votes against the union in determining whether it polled a majority of the votes cast. 29 U.S.C.A. 159(a). Obviously, an unmarked or otherwise non-committal ballot is not a vote; therefore, since it is generally the votes and not the number of ballots which decide an election, clearly there is no merit to this argument. In *National Labor Relations Board v. Whittier Mills,* 5 Cir., 111 F. 2d 474, we held that a majority of the votes cast in an election was sufficient for the selection of a bargaining representative and that employees who could have voted but declined to do so would be considered as having assented to the will of the majority of those who did not. This rule is applicable here where eligible voters went to the pools but, by casting blank ballots, declined to indicate their preference and, in effect, waived their right to vote for or against the union. The Board has long adhered to this rule[4] and we approve it as a reasonable one. The following statement from *Semi-Steel Casting Co. v. National Labor Relations Board,* 8 Cir., 160 F. 2d 388, 392, certiorari denied, 332 U.S. 758, is appropriate here;

> "It is not unreasonable to say that the employee whose vote was marked both for and against the union did not participate in the election. So far as can be ascertained from his ballot, he attended the polls merely to express his indifference to the result."

[4] *Interlake Iron Corporation,* 4 N.L.R.B. 55, 61-62; *Sorg Paper Company,* 9 N.L.R.B. 136, 137; *American Tobacco Co.,* 10 N.L.R.B. 1171, 1172; *Jabez Burns & Sons, Inc.,* 72 N.L.R.B. 18, 19; *Q-F Wholesalers, Inc.,* 87 N.L.R.B. 1085, 1088.

It is further contended that the Watson affidavit made out a prima facie case of coercion on the part of the union and under section 102.61 of the rules and regulations of the Board and the ruling of this court in *National Labor Relations Board v. Sidran*, 5 Cir., 181 F. 2d 671, respondent was entitled to a hearing on this issue. Alternatively, respondent contends that even without a hearing the evidence contained in the record sustains its claim of coercion and requires that a new election be ordered. We do not agree. While it is true that Watson stated in the affidavit that he and a second employee, Lewis, cast blank ballots in an effort to "fool" the union and that they were afraid to vote against the union although they wanted to "vote for the Company", the affidavit does not sustain the contention that the union was responsible for Watson's apprehension. Watson said that after respondent's manager had made a speech to the employees with regard to the coming representation election, a pro-union employee who had previously asked him to vote for the union approached him and, in what Watson thought was a threatening tone, asked him how he was going to vote and whether the speech had frightened him. When Watson replied that he was going to vote for the majority, meaning for the union, the other employee retorted, "O.K., don't let him scare you." According to the affidavit, this conversation led Watson to believe that the union would "do something" to him if he did not vote for it. Our consideration of the record leads us to the conclusion that a prima facie case has not been made out and that the Board was not required to grant a hearing on this objection. Moreover, even if it were established that Watson and Lewis were improperly influenced by pro-union employees this would not change the result of the election since the union would still have a majority if those two ballots were counted as votes against it.

The objections of respondent are overruled and the petition for enforcement is granted.

ENFORCED.

JUDGMENT

Extract from the Minutes of July 7, 1954.

No. 14670

National Labor Relations Board

versus

Vulcan Furniture Manufacturing Corporation

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the National Labor Relations Board, made on March 20, 1953, "In the Matter of Vulcan Furniture Manufacturing Corporation and United Furniture Workers of America, CIO" Case No. 10-CA-1317, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the said National Labor Relations Board in this cause be, and the same is hereby, ordered enforced.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 346

VULCAN FURNITURE MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 17–22) is reported at 214 F. 2d 369. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 81–84)[1] are reported at 103 N. L. R. B. 870.

[1] The reference "R" designates the Transcript of Record in the court of appeals; "B. A." the Appendix to the brief of the Board filed in the court below; and "Pet." the Petition herein.

JURISDICTION

The judgment of the court below was entered on July 7, 1954 (Pet. 23). The petition for a writ of certiorari was filed on September 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Whether an employer charged with a refusal to bargain with a union has the right in proceedings before the National Labor Relations Board to adduce evidence to show that the non-Communist affidavits filed by the union with the Board to establish compliance with Section 9 (h) of the National Labor Relations Act are in fact false or otherwise inadequate to establish such compliance.[2]

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29

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[2] Since petitioner does not set forth any reasons which would warrant consideration of its second question, we note only that the Board's uniform practice of disregarding blank ballots cast in a representation election was expressly approved by the court below in the instant case and is comparable to the practice approved by the courts in analogous situations. See *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 560–561; *Association of Clerical Employees* v. *Brotherhood, etc.*, 85 F. 2d 152, 157 (C. A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 392 (C. A. 8), certiorari denied, 332 U. S. 758.

U. S. C. 151, *et seq.*), and the Communist Control Act of 1954 (Public Law 637, 83rd Cong., 2d Sess.), are set forth in the Petition, pp. 13–16.

STATEMENT

On May 7, 1951, United Furniture Workers of America, CIO, herein called the Union, initiated a representation proceeding before the Board to obtain certification as bargaining representative of petitioner's employees (R. 4–10). Petitioner, alleging that Max Perlow, a past president of the Union, had admitted his Communist affiliation, moved to dismiss the proceeding or hold it in abeyance pending an investigation to determine whether the Union was still "Communist inclined or aligned" (B. A. 40). In its Decision and Direction of Election, issued August 29, 1951, the Board denied this motion on the ground that "the fact of compliance by a labor organization which is required to comply, is a matter for administrative determination and is not litigable by the parties. Moreover, the Board is administratively satisfied that the [Union] is in compliance". (R. 29, n. 1.)[3]

In due course the Union was certified (R. 50–53). However, petitioner refused to honor the

[3] In this connection the Board cited its own decision in *Sunbeam Corp.*, 94 N. L. R. B. 844, where the Board stated that as part of its administrative investigation of compliance, it considers any relevant information brought to its attention.

certification and a complaint issued on the Union's charge that petitioner was unlawfully refusing to bargain (R. 63–66). During the unfair labor practice hearing held pursuant to this complaint, petitioner again urged, *inter alia,* that the Union was not in compliance with Section 9 (h) of the Act and attempted to adduce evidence in support of this claim (B. A. 16–17, 24–25). The Board affirmed the Trial Examiner's rejection of the proffered evidence (R. 82, n. 2).[4] The Board reiterated its ruling that the fact of compliance by a labor organization is a matter for administrative determination and is not litigable by the parties. It also made an express administrative finding, as it had in the prior representation proceeding, that the Union was in compliance with Section 9 (h), its officers having filed the required non-Communist affidavits. (R. 82, n. 2.)

On the Board's petition for enforcement, the court below affirmed the Board's findings of an unlawful refusal to bargain and entered a decree enforcing the Board's order (Pet. 17–23). Addressing itself to the propriety of the Board's administrative determination that the Union was in compliance with Section 9 (h) of the Act and

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[4] The Trial Examiner, while rejecting testimony and exhibits proffered by petitioner, accepted an offer of proof and placed the exhibits in a "rejected exhibits" file (B. A. 16–17, 24). This material was available to the Board and is now before this Court as part of the certified record (R. 99, par. 14).

the propriety of its refusal to receive evidence in support of petitioner's contention to the contrary, the court below agreed that, whatever the scope of the Board's power with respect to initiating an administrative inquiry into the truth or falsity of non-Communist affidavits filed pursuant to Section 9 (h), neither the Act nor the intent of Congress warranted the view that once the requisite affidavits had been filed, a party to a proceeding before the Board "may question the truthfulness of the affidavits or whether the ostensible officers filing them are the true directors of the Union involved" (Pet. 20).

ARGUMENT

1. The question presented is whether the Board properly denied petitioner the right to adduce evidence in proceedings before the Board to establish that the Union's non-Communist affidavits, formally sufficient on their face, were in fact inadequate to establish compliance with Section 9 (h) of the Act. Petitioner, dissatisfied with the Board's express administrative determination that the requisite non-Communist affidavits had been filed and that the Union was in fact in compliance, sought to litigate that issue in the course of proceedings before the Board.

The ruling of the court below that this question is not litigable by private parties in proceedings before the Board—a conclusion concurred in by the two other courts of appeals which have speci-

fically considered the question—is clearly correct.[5] *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649–651 (C. A. 6); *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7); cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4); *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), certiorari denied, 341 U. S. 950; *Law* v. *National Labor Relations Board*, 192 F. 2d 236, 239 (C. A. 10). As the court below stated (Pet. 20):

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[5] Petitioner ostensibly challenges the decision below only insofar as "it may be construed to have denied a party's right to give (as opposed to litigate) and the Board's duty to receive, evidence of non-compliance with Section 9 (h)" (Pet. 8). It also disclaims any purpose to litigate the fact of compliance by the Union, asserting that all it sought to do was "to furnish the Board with information which would tend to show the falsity of the affidavit filed by the Union (B. A. 21–25)" (Pet. 9). It is clear, however, that petitioner's disclaimer is insubstantial and that its disagreement with the decision below turns upon the denial of petitioner's asserted right to "litigate" the issue of compliance. For, in petitioner's words, it is insisting upon a right to show "through cross examination of the Union's representatives, * * * who were all of the officers of the Union (B. A. 16–17)"; "to introduce evidence which would tend to show that there were officers of the Union who were Communists (B. A. 16–25)"; and "to subpoena and question witnesses and examine documents from which evidence relevant to compliance can be obtained and submitted to the Board" Pet. 8, 10–11).

> * * * Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act.

The legislative history of the Act discloses that Congress considered and rejected a provision which forbade certification of any union as a collective bargaining representative if its officers were members of the Communist Party—a provision which would have rendered that issue litigable in every case before the Board.[6] It was to avoid this result and to prevent Board proceedings from being delayed and encumbered with such issues that Congress adopted Section 9 (h) in its present form requiring the filing with the Board of non-Communist affidavits. 93 Cong. Rec. 6444, 6447, 6860. See also cases *supra*.[7]

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[6] H. R. 3020, 80th Cong., 1st Sess. See Sec. 9 (f), (g) (April 18, 1947), (h) (May 13, 1947) in 1 Legislative History of the Labor-Management Relations Act, 1947 (Govt. Print. Off., 1948).

[7] The Joint Committee on Labor-Management Relations Act, established by Congress to study and report on the operation of the amended Act, has noted with approval the Board's practice of refusing to permit private parties to litigate compliance issues in Board proceedings. S. Rept. No. 986, Part 3, 80th Cong., 2d Sess., p. 45, quoted in *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922 (C. A. 6), certiorari denied, 342 U. S. 859.

As the court below indicated (Pet. 20), the question of the power of the Board to initiate and conduct an administrative inquiry into the question of the truthfulness of the affidavits or whether the ostensible officers filing them are the true directors of the union involved (which this Court declined to review last term) is not presented by this case. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943; cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968. It is thus beside the point to say, as petitioner urges (Pet. 10), that the effect of the decision below "is to shut off [the Board's] most likely and practical course for getting any information on which to base an investigation" as to the compliance status of a union. The difficulties which the statutory scheme may entail are matters which appropriately should be addressed to Congress rather than the courts. In this connection attention is invited to the Communist Control Act of 1954[8] (Pet. 15–16), which, *inter alia*, requires the Subversive Activities Control Board to serve a copy of any order with respect to Communist-infiltrated labor organizations on the National Labor Relations

[8] Public Law 637, 83d Cong., 2d Sess., Sec. 10 adding 13A (g), (h), (i) to the Subversive Activities Control Act of 1950 (64 Stat. 987, 50 U. S. C. 781 *et seq.*).

Board, and provides that when there is in effect a final order of the Subversive Activities Control Board determining that any such labor organization is Communist infiltrated, such organization shall be ineligible to serve as an exclusive representative of employees of any bargaining unit under Section 9 of the National Labor Relations Act, as amended (29 U. S. C. 159), or to make any charge under Section 10 of the Act (29 U. S. C. 160).

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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OCTOBER 1954.

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